DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-187278 DATE: March 28, 1977

MATTER OF: Army Corps of Engineers' Continuing Contracts

DIGEST: 1. 33 U.S.C. § 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477 (1923) overruled.

2. Recognition that under 33 U.S.C. § 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Pub. L. No. 93-344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures.

The Chief of Engineers, Department of the Army, has requested our opinion as to the legality of proposed revisions to the Corps of Engineers' standard "Funds Available for Payments" clause used in "continuing contracts" for the prosecution of public works projects.

The "continuing contracts" here involved are authorized by section 10 of the River and Harbor Act of 1922, 33 U.S.C. § 621 (1970), which provides as follows:

> "Any public work on canals, rivers, and harbors adopted by Congress may be prosecuted by direct appropriations, by continuing contracts, or by both direct appropriations and continuing contracts."
> (Emphasis added.)

The use of continuing contracts permits large multi-year civil works projects to be accomplished in a comprehensive manner, rather than through a series of yearly work units. Under the Corps' long-standing continuing contract practices, a multi-year contract is entered into for the completion of certain construction work. However, appropriations are sought each year only to cover contract payments to be made in that year. The current Funds Available for Payments clause limits the Government's obligation under the continuing contract to the amounts actually appropriated from time to time for contract payments. As discussed hereafter, the basic effect of the Corps' proposed revisions to the Funds Available for Payments clause would be to permit obligation of the full amount of a continuing contract in advance of appropriations adequate for its fulfillment.

In order to examine these proposed revisions in the proper context, a brief review of the origin and background of continuing contracts is necessary. Prior to enactment of section 10 of the River and Harbor Act of 1922, it had been the practice of the Corps to seek appropriations covering the entire cost of civil works projects at the outset. The Congress would adopt and fund these projects by enacting for each specific project a line-item appropriation in the annual River and Harbor appropriation acts. See, e.g., the River and Harbor Act of 1912, approved July 25, 1912, ch. 253, 37 Stat. 201.

The Corps was required to obtain full funding in advance for its civil works projects, including appropriations covering the full amounts of construction contracts, by virtue of the "Anti-deficiency Act," section 3679 of the Revised Statutes, now 31 U.S.C. § 665 (1970 & Supp. V, 1975), and related statutes--41 U.S.C. §§ 11(a) and 12 (1970)--which prohibit obligations in excess of, or in advance of, appropriations unless authorized by law. The applicability of these statutory prohibitions to river and harbor projects was specifically confirmed by the United States Supreme Court in Sutton v. United States, 256 U.S. 575 (1921), which held that work performed under a river and harbor contract in excess of the amount appropriated did not create a valid obligation against the Government.

The full funding practice described above resulted in the Corps holding large balances of unexpended appropriations during the initial stages of multi-year projects. However, starting with the River and Harbor Act of 1892, 27 Stat. 88, and continuing intermittently through the River and Harbor Act of 1916, 39 Stat. 391, statutory language was included which authorized the Corps to enter into contracts for completion of a limited number of specific public works projects in advance of appropriations necessary to cover the work. This language was usually worded in the following manner:

> "* * * Provided, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate one million nine hundred and fifty-three thousand dollars, exclusive of the amount herein and heretofore appropriated."
> E.g., 27 Stat. 91 (improvement of Charleston Harbor). (Emphasis added.)

In the years following 1892 increasing numbers of specific projects were funded in this manner. These contracts were commonly referred to as "continuing contracts." In an 1896 opinion, 21 Ops. Att'y Gen. 379, the Attorney General recognized that such "continuing contract" authority constituted an exception to the Anti-deficiency Act:

> "Under the present [river and harbor] statute, authority is expressly given to the head of the War Department to contract for the construction of public works in certain cases which may require many years to complete, and under the contracts so made the Government will be involved for the future payment of money largely in excess of the amount already appropriated." Id. at 380.

Of course, the opinion went on to point out that the contractor must be content to remain a creditor of the Government until funds were appropriated to pay the full contract price. Also a 1905 decision

of the Comptroller of the Treasury, 12 Comp. Dec. 11, implicitly recognized that these contracts were exempt from the Antideficiency Act in holding that the Secretary of War had authority to require contractors under "continuing contracts" to do work beyond the amount of appropriations available at the time.

In 1922 the Corps requested from Congress permanent authority to enter into "continuing contracts," whereby Congress would initially authorize a project to its completion and each year thereafter appropriate enough funds to pay for the work planned for that year. The Congress responded by enacting section 10 of the River and Harbor Act of 1922, 33 U.S.C. § 621, supra.

Shortly after the enactment of section 10, the Corps requested our decision on whether it could lawfully enter into a contract, pursuant to section 10, where the contract price was in excess of the current year appropriation. We held in 2 Comp. Gen. 477 (1923) that such authority existed under section 10 so long as the contract contained a "funds available for payments" clause (as proposed by the Corps) which contained language to preclude Government liability for any work done in excess of available funds:

> "If this paragraph [the funds available for payments clause] be made a part of the contract and it be specifically provided that the Government is not bound for the payment of any sum in excess of that now available from the allotment by the Secretary of War nor liable in any manner for the failure of Congress from time to time to appropriate funds for so much of the work done in excess of available funds, or to appropriate funds to continue or complete the work, there would appear to be authority for entering into such contract under the authority of the act of September 22, 1922." Id. at 479.

The current "Funds Available for Payment" clause used for continuing contracts is similar to the original version proposed by the Corps in 1923 and contains the exculpatory language referred to in our 1923 decision. Pertinent excerpts from the current clause are as follows:

"(a) Such work as may be done under this contract in excess of the amount for which funds are available for payment as herein set forth, will be continued with funds hereafter appropriated and allotted for this work.

"(b) From funds heretofore appropriated by the Act of _____ (____ Stat. ___) for _____ the sum of $_____ is available for payments to the contractor for work performed under this contract.

* * * * *

"(d) If the rate of progress of the work is such that it becomes apparent to the contracting officer that the balance of this allocation and any allocation for this and any subsequent fiscal years during the period of this contract is less than that required to meet all payments due and to become due the contractor because of work performed or to be performed under this contract, the contracting officer may provide additional funds for such payments if there be funds available for such purpose. The contractor will be notified in writing of any additional funds so made available. However, it is distinctly understood and agreed that the amount of funds stated in (b) above is the maximum amount which it is certain will be available during the current fiscal year. The Government is in no case liable for payments to the contractor beyond this amount or such additional amount as may subsequently be made available by the contracting officer pursuant to this paragraph (d).

"(e) It is expected that, during subsequent fiscal years over the period of this contract, Congress will make additional appropriations for expenditure on work under this contract. The contracting officer will notify the contractor of any additional allocation of funds to this

contract when such funds become available. It is understood and agreed that the Government is in no case liable for damages in connection with this contract on account of delay in payments to the contractor due to lack of available funds. Should it become apparent to the contracting officer that the available funds will be exhausted before additional funds can be made available, the contracting officer will give at least 30 days written notice to the contractor that the work may be suspended. If the contractor so elects, after receipt of such notice, he may continue work under the conditions and restrictions under the specifications, so long as there are funds for inspection and superintendence, with the understanding, however, that no payment will be made for such work unless additional funds shall become available in sufficient amount. When funds again become available, the contractor will be notified accordingly. Should work be thus suspended, additional time for completion will be allowed equal to the period during which work is necessarily so suspended, as determined by the dates specified in the above-mentioned notices.

* * * * *

"(h) Should Congress fail to provide additional funds the contract may be terminated and considered to be completed, at the option of the contractor, without prejudice to him or liability to the Government, at any time subsequent to 30 days after payments are discontinued, or at any time subsequent to 30 days after the passage of the Act which would have but did not carry an appropriation for continuing the work or after the adjournment of the Congress which failed to make the necessary appropriations. However, if the funds cited in the contract are enough to extend the work beyond the end of the fiscal

> year and no new funds are allocated to this contract for the ensuing fiscal year, the contractor must first exhaust all the cited funds and thereafter he may, at his option, exercise the rights provided in this paragraph any time after payments are discontinued."
> (Emphasis added.)

It appears that the basic nature of the Funds Available clause and the rationale for its inclusion in continuing contracts have remained essentially the same since 1923. Recently, however, the Corps has been experiencing problems in administering the Funds Available clause. The Corps submission to us points out that in C. H. Leavell and Company v. United States, 530 F.2d 878 (1976), the Court of Claims allowed an equitable adjustment to a contractor under a continuing contract who had suspended work due to delays in the enactment of appropriations necessary to meet his contract payments. This equitable adjustment was permitted under the "Suspension of Work" clause notwithstanding the Corps' argument that the Funds Available clause, supra, precluded any Government liability caused by delay in obtaining appropriations.

The Corps' submission outlines its problems with the current Funds Available clause--resulting from the Leavell decision and other considerations--and its proposed contract changes as follows:

> "The Leavell decision recognizes that a payment delay due to exhaustion of funds does not breach a 'continuing contract.' However, the decision holds the Government liable for extra costs to the contractor arising from the contractor's own decision to suspend work after progress payments were stopped. A significant factor in this decision was the risk to the contractor that, even if he had been able and decided to finance the work himself, he may never have been paid for the work or even for the interest on money borrowed to continue the work.
>
> "As a result of the Leavell decision, the Corps proposes a substantial revision of the 'Funds Available for Payments' clause. The principal changes are: (1) to pay interest on delayed

payments, (2) to allow contractors to treat a contract as terminated for the convenience of the Government if payments are delayed for an inordinate period, (3) to assure contractors of eventual payment for all contract earnings, and (4) to bar claims for costs of suspension or delay of work due to delayed payments.

"The proposed new approach will not affect the way the work has generally been done in the past. It seeks to assure equitable treatment and to clarify the lack of actual risk that has generally prevailed. The Corps has always ultimately made all payments earned under these continuing contracts, and nearly always has made these payments as soon as they were earned. The new approach is expected to result in lower bids and contract costs. It is also expected to result in more efficient construction operations and earlier availability of project benefits."*/

Since the submission did not include the actual language of the proposed contract changes, our analysis is necessarily limited to the purposes of the changes as stated. Of the proposed contract changes listed above, item (3) is the most significant, and it is the key to the other proposed changes. Proposed change (3) would "assure contractors of eventual payment for all contract earnings." Obviously the Corps cannot "assure" in an absolute sense any payments beyond the amount of appropriations available at the time the

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* We note that the Leavell decision did not question the validity of the Funds Available clause but merely held that this clause was not intended to preempt an equitable adjustment under the Suspension of Work clause, even where the suspension is caused by a lack of funds. Since the decision thus rests solely on matters of contract interpretation, it could be overcome by amending the exculpatory language of the Funds Available clause to expressly preclude remedies under the Suspension of Work clause. However, as indicated in the above-quoted excerpt from the submission, the Corps seems to have practical problems with the current Funds Available clause which transcend the holding in Leavell.

contract is made. Instead, it appears that the basic effect of this proposed change would be to treat the full contract price as a legal obligation, recordable under 31 U.S.C. § 200(a)(1) (1970), even though appropriations sufficient to liquidate the full obligation are not available at that time. While it is conceivable in theory that Congress might still refuse to appropriate for the liquidation of such obligations, failure to appropriate would under the revised contract provisions leave the contractor with legal rights to recover for his contract earnings. See, e.g., New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966); Gibney v. United States, 114 Ct. Cl. 38, 50-52 (1949); Seatrain Lines, Inc. v. United States, 99 Ct. Cl. 272, 316 (1943).

This is in contrast to the current Funds Available clause which purports (subject to the exception recognized in Leavell) to limit the Government's legal obligation and the contractor's right of recovery to amounts actually appropriated from time to time. In other words, proposed change (3) would alter the Government's obligation under a continuing contract from one limited by appropriations actually made to one based on the contract as written independent of the existence of liquidating appropriations. This dichotomy in the theories of Government obligations was explained as follows in Shipman v. United States, 18 Ct. Cl. 138, 146-147 (1883):

> "The liability in this case rests wholly upon the appropriation, and is different from those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all.
>
> "In such cases the authority to cause the work to be done and to make contracts therefor is complete and unrestricted. All work, therefore, done under the direction of the officers thus charged with the execution of the law creates a liability on the part of the Government to pay for it, and if a written contract be made and work be done in excess of the contract specifications, or entirely outside of or

> in addition to the written contract, and such work inures to the benefit of the United States, in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced.
>
> "We have frequently held that where there is a liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money with which to discharge it. (Collins's Case, 15 C. Cls. R., 35.)
>
> "But where an alleged liability rests wholly upon the authority of an appropriation they must stand and fall together, so that when the latter is exhausted the former is at an end, to be revived, if at all, only by subsequent legislation by Congress. (McCullom v. United States, 17 C. Cls. R., 103; Trenton Co. v. United States, 12 ibid., 157.)"

Similarly proposed contract changes (1) and (2), above, would afford contractors remedies which do not now exist, premised on the theory that the contractor has a legal entitlement based on his full contract earnings. Proposed change (4) would eliminate the contractor's right to an equitable adjustment under the Suspension of Work clause, which the Leavell decision recognized. This is presumably based on the theory that in view of the other changes, a contractor would have no occasion to suspend work.

The question presented by the Corps is whether the foregoing proposed contract changes would contravene the Antideficiency Act or our decision in 2 Comp. Gen. 477.

The Antideficiency Act, supra, provides in subsection (a), 31 U.S.C. § 665(a)(1970):

> "No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of

> the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law." (Emphasis added.)

Since the very purpose of the Corps' proposed contract changes is to create contractual obligations in excess of existing appropriations, the basic issue is whether the continuing contract authority of 33 U.S.C. § 621 satisfies the "unless * * * authorized by law" exception to the prohibitions of the Antideficiency Act.

As noted previously, even prior to the enactment of 33 U.S.C. § 621 in 1922, Congress had authorized certain projects to be undertaken on a "continuing contract" basis, and it was recognized that this authority represented an exception to the Antideficiency Act. The legislative history of section 10 of the River and Harbor Act of 1922, which enacted 33 U.S.C. § 621, indicates that the purpose of this section was to provide a general statutory authorization for the same type of "continuing contracts."

The proposal for general continuing contract authority was explored in some detail in the Hearings before the House Committee on Rivers and Harbors on H.R. 10766, 67th Cong., 2d Sess. (1922). General Harry Taylor, Assistant Chief of Engineers, explained the proposal as follows:

> "* * * The idea is to give us authority to enter into contracts for completion. That is, for exceeding the amount of money that has been appropriated. That would be exceedingly advantageous in a project, for instance, like this lock and dam project on the Ohio River, or the East River, covering a long term. A lock and dam on the Ohio River, for instance, will take four years or more to complete, and we well know that we cannot spend $2,000,000 for its construction the first year, as that is the whole amount

it would cost. But unless we have money or authorization for it we cannot make a contract for the completion of that dam.

"If we have $500,000 and an authorization we can then make a contract for the entire dam, depending upon future appropriations to get the money; but if we do not have that authorization we must allot the full $2,000,000 to that dam and that remains unused from three to four years--the main part of it. That is one of the troubles we have had with our very large unexpended balances. Whenever we come to the Committee for further appropriations they say, 'you have a large unexpended balance.' It is true we did have a large unexpended balance but a large part of it was tied up in these contracts. Id. at 10.

At a later stage in the hearings, General Taylor stated:

"I think it would be a very excellent scheme if we could get a continuing contract authorization for work on a number of projects * * *. In order to make a contract, a suitable contract for the construction of a lock and dam, we have got to make a contract for the completion of the whole thing. In other words, you cannot make a contract for the construction of half a dam.

* * * * *

"* * * If we do not have a continuing contract authorization we must have the full amount of money to meet the payments under a contract at the time the contract is made.

* * * * *

> "* * * Now if we had a continuing contract authorization, all the money that we would allot to that would be the money to meet the payments of the first year. We would not have that big balance on hand. Then the next year we could come to Congress and say, 'We have a contract for this dam, and this contract obligation next year will be $300,000,' or $400,000, which ever it may be, and get the money to meet those obligations as they come due * * *."
> Id. at 93.

Finally, the hearings disclose the following colloquy:

> "The Chairman. . . . the [contractor] would know that he had that work ahead, and he would bid lower on that piece of work than he would on a small piece of work?
>
> "Gen. Taylor. There is much more active competition for the large work: Yes, sir.
>
> "The Chairman. . . . you do not tie up any funds at all; you simply, from year to year, report to Congress the sums needed for continuing contracts?
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> "Gen. Taylor. Yes, sir.
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> * * * * *
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> "The Chairman. Now if you had a continuous contract there you would not have any money tied up: you would simply, from year to year, come to Congress and say: 'Here is our contract for which so much money is needed. We are going to use this year $200,000 or $300,000 on this section.' And, so, you would report your aggregate cost on the entire

> Ohio River, and that is all you would use and you would only use it as you needed it, and as the work was done, and as the amounts became due under the contracts.
>
> "Mr. McDuffie. But, Mr. Chairman, what do you think about passing a bill or presenting a bill to Congress authorizing these continuing contracts?
>
> "The Chairman. I do not think there is any question but what it ought to be done." Id. at 94.

While the House bill did not include a continuing contract authorization, such a provision was added to the Senate version of the bill. The Senate report explained the provision as follows:

> "Another amendment seeks to authorize continuing contracts in particular cases where it is shown to be economical and wise. This will tend to the more expeditious and economical prosecution of adopted projects for which appropriations are made." S. Rep. No. 813, 67th Cong., 2d Sess. 7 (1922).

The conferees adopted the Senate language, with an amendment making the continuing contract authority applicable generally to future projects, and this provision was enacted as section 10 of the 1922 Act.

In view of its language and legislative history, we are satisfied that 33 U.S.C. § 621 permits the full contract price for continuing contracts to be obligated at the outset in a manner that would otherwise be prohibited by the Antideficiency Act. This being the case, our decision at 2 Comp. Gen. 477, supra, is overruled insofar as it holds that such contracts must contain a funds available clause which limits the Government's obligation to amounts appropriated from time to time. In fact, our Office has implicitly recognized, subsequent to the decision at 2 Comp. Gen. 477, that the funds available clause is not required as a matter of law. Thus in a letter to former Senator Len B. Jordan dated December 3, 1969, B-163310, commenting on proposals to eliminate the funds available clause, we stated:

> "As to whether in the future the Army should, as a matter of policy, omit from its contracts the 'Funds Available for Payments' clause and specifically provide in the contract that in case of lack of funds the Army would order the suspension of work or termination of the contract at its own expense or would reimburse the contractor for interest if--in such case--he continues the project with his own funds, is a matter for administrative determination by the Department of the Army. It would be our view, however, that before adopting such a policy in connection with continuing contracts, the Department of the Army should bring the matter to the attention of the appropriate committees of Congress, advising the committees of the possible results thereof insofar as costs to the Government are concerned, since this apparently would be a departure from a policy long followed by the Corps."

It follows that we have no legal objection, in principle, to the contract changes here proposed by the Corps.

However, the foregoing conclusions as to the Corps' continuing contract authority under 33 U.S.C. § 621 raise additional issues concerning the proper budgetary treatment of this authority.

The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (July 12, 1974), 88 Stat. 297, established a comprehensive system to govern the budgetary process in which the concept of "budget authority" is a central element. For example, both the President's budget and the first concurrent resolution on the budget for each fiscal year must include new budget authority in total and by each major functional category. See 31 U.S.C. §§ 1322(a)(1)-(2), 11(d) (Supp. V, 1975). Section 3(a)(2) of Pub. L. No. 93-344, 31 U.S.C. § 1302(a)(2) (Supp. V, 1975), defines "budget authority" to mean:

> "authority provided by law to enter into obligations which will result in immediate or

> future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government."

Closely related to the concept of budget authority are the following provisions concerning "new spending authority" in section 401 of Pub. L. No. 93-344, 31 U.S.C. § 1351 (Supp. V, 1975):

> "(a) LEGISLATION PROVIDING CONTRACT OR BORROWING AUTHORITY--It shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution which provides new spending authority described in subsection (c)(2)(A) or (B) (or any amendment which provides such new spending authority), unless that bill, resolution, or amendment also provides that such new spending authority is to be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.
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> * * * * *
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> "(c) DEFINITIONS.--
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> "(1) For purposes of this section, the term 'new spending authority' means spending authority not provided by law on the effective date of this section, including any increase in or addition to spending authority provided by law on such date.
>
> "(2) For purposes of paragraph (1), the term 'spending authority' means authority (whether temporary or permanent)--
>
> "(A) to enter into contracts under which the United States is obligated to make outlays, the budget authority for which is not provided in advance by appropriation Acts * * *."

Under the current budgetary practices applicable to the Corps' continuing contracts, budget authority for such contracts derives

from a two-stage congressional authorization and appropriation process. The continuing contract authority of 33 U.S.C. § 621 does not of itself provide budget authority since it is expressly limited to projects "adopted by Congress * * *." Such public works projects are subject to specific statutory authorization on a project-by-project basis. See e.g., section 2 of the Water Resources Development Act of 1974, Pub. L. No. 93-251 (March 7, 1974), 88 Stat. 14; section 101 of the River and Harbor Act of 1970, Pub. L. No. 91-611 (December 31, 1970), 84 Stat. 1818.* The language of such statutory authorizations is illustrated in section 101 of the River and Harbor Act of 1970, supra, as follows:

> "The following works of improvement of rivers and harbors and other waterways for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted by the Secretary of the Army, acting through the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated. * * *"

Section 101 goes on to list the projects authorized, together with the Corps report and the estimated cost of each project.

Even after authorization, a project is not undertaken until appropriations have been requested and enacted to provide funding for at least a portion of the total project cost. Such appropriations are made to the Corps on a lump-sum basis, and are available until expended, under the heading "Construction, General." See e.g., the Public Works for Water and Power Development and Energy Research Appropriation Act, 1977, Pub. L. No. 94-355 (July 12, 1976), 90 Stat. 889, 891, which provides in part in the appropriation for Construction, General:

> "For the prosecution of river and harbor, flood control, shore protection, and related

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* Some projects may be undertaken by the Corps without individual congressional authorization. See 33 C.F.R. part 263 (1976) for a description of the applicable general statutory authorizations. However, these projects would not be prosecuted under continuing contracts.

> projects authorized by laws; * * *
> $1,436,745,000, to remain available
> until expended: Provided, That no part
> of this appropriation shall be used
> for projects not authorized by law or
> which are authorized by law limiting
> the amount to be appropriated therefor,
> except as may be within the limits of
> the amount now or hereafter authorized
> to be appropriated * * *."

The specific projects intended to be funded are listed in the accompanying committee reports. There may be a substantial time lag between congressional authorization of a project and the initial funding for the project. In fact, procedures have been enacted for the deauthorization of projects for which appropriations have not been made within 8 years. See 33 U.S.C. § 579 (Supp. V, 1975).

Authorizations and appropriations are enacted with reference to each project as a whole, rather than its constituent elements such as individual construction contracts within a project. Moreover, the project costs contemplated by the authorization and appropriation include items other than construction contracts. It is our understanding that the method of prosecuting construction for a project, i.e., by continuing contract or otherwise, is not determined at the authorization stage. However, when and to the extent it is later determined that certain construction will be prosecuted by continuing contract, we understand that the Corps annually requests only such funding as is necessary to cover payments for each year's work under the contract.

The current budgetary practices, as described above, are consistent with the theory of continuing contracts reflected in our 1923 decision and the Corps' use of the present Funds Available clause. Since the Government's legal obligation under this theory is limited to amounts appropriated, budget authority would come into being only as the appropriations are enacted from time to time. However, under the theory that the Corps may invoke 33 U.S.C. § 621 to obligate the full amount of continuing contracts in advance of appropriations, the requisite budget authority for purposes of Pub. L. No. 93-344 is complete as a matter of law once a project subject to 33 U.S.C. § 621 has been authorized by Congress.

In this regard, we have on several occasions expressed the view that the concept of budget authority should be liberally applied so as to effectuate the purposes of Pub. L. No. 93-344. Thus we observed in B-159687, March 16, 1976:

> "* * * the fundamental objective of the Congressional Budget Act of 1974 was to establish a process through which the Congress could systematically consider the total Federal budget and determine priorities for the allocation of budget resources. We believe this process achieves its maximum effectiveness when the Budget represents as complete as possible a picture of the financial activities of Federal agencies. We further believe it is vital to maximizing the effectiveness of the process that Federal financial resources be measured as accurately as possible because priorities are actually established through decisions on the conferring of this authority. From this standpoint, therefore, the concept of 'budget authority' should (a) encompass all actions which confer authority to spend money, (b) reflect as accurately as possible the amount of such authority which is conferred and (c) be recognized at the point at which control over the spending of money passes from the Congress to the administering agency."

Consistent with the last point noted above, we have emphasized that the benchmark of budget authority is the legal authority to incur obligations, even where administrative discretion exists concerning obligational levels or where the use of the authority is contingent upon administrative findings. See B-171630, August 14, 1975; B-114828, January 31, 1977.

Applying these considerations to the instant matter, we believe that the new theory of continuing contracts will require significant changes in the presentation of budget authority for projects subject to 33 U.S.C. § 621, although we recognize that a number of issues will arise concerning precisely how this should be done. Accordingly, we urge the Corps to take up these issues with the cognizant congressional committees. We will, of course, be pleased to provide any assistance that the committees or the Corps may desire.

Comptroller General
of the United States